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IN THE

# Supreme Court of the United States

OCTOBER TERM A. D. 1965

No. ~~1366~~ 184

JOHN R. HURLEY and THE MERCHANTS NATIONAL BANK OF MUNCIE, Co-Executors of the Estate of Anson G. Hurley, Deceased,
JOHN R. HURLEY, Special Administrator of the Estate of Shirley P. Hurley, Deceased,
W. GALE PHENEGER and THE MERCHANTS NATIONAL BANK OF MUNCIE, Co-Administrators of the Estate of Inez Elizabeth Hurley, Deceased,

Petitioners,

vs.

BEECH AIRCRAFT CORPORATION,

Respondent.

## Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

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Petitioners,

vs.

BEECH AIRCRAFT CORPORATION,

Respondent.

## Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

## CITATIONS TO OPINIONS BELOW.

Judgment without opinion of the United States District Court for the Southern District of Indiana, Indianapolis Division, was entered following trial without jury. The opinion of the United States Court of Appeals for the Seventh Circuit affirming judgment is reported in 355 F. (2d) 517, and is reprinted in Appendix A, Infra, page 1a. The trial court's pertinent Findings of Fact and Conclusions of Law are reprinted in Appendix B, Infra, page 11a.

## JURISDICTION.

The judgment of the United States Court of Appeals was entered on January 26, 1966. Petition for rehearing en banc, timely filed, was denied on February 28, 1966. Jurisdiction of this court is invoked pursuant to 28 U.S.C., Section 1254 (1). Federal jurisdiction originally was based upon diversity of citizenship. 28 U.S.C. Sec. 1332.

## QUESTION PRESENTED.

The question presented is:

1. Where a district court *erroneously* dismisses one count of a complaint before trial, is the error rendered harmless under Rule 61 F.R.C.P. because of findings of fact made by the trial court in a subsequent trial on another count, which findings may have been based upon evidence which would have been inadmissible in a trial on the dismissal count?

## STATEMENT OF FACTS.

Petitioners are the executors of the estates of Dr. Anson G. Hurley, his wife, and sister-in-law all of whom were killed when a new Beech Bonanza, owned and operated by Dr. Hurley, an experienced instrument pilot, crashed on a routine cross country flight. The plane, which was new, was manufactured by the defendant in Kansas and was purchased by Dr. Hurley from a dealer in Indiana. The action was brought for the wrongful deaths alleging (1) breach of implied warranty (strict liability theory) and (2) negligence in the manufacture of the plane. The warranty count was erroneously dismissed for lack of privity, and trial to the court was held on the negligence count.

The record of the trial is voluminous. Admittedly, there was an in-flight structural failure of the left wing, which on the Beech Bonanza is attached to the fuselage by four bolts and nuts loaded in tension; i.e. pressure against the bolt-head and the nut. Admittedly, the primary failure was at the upper forward left wing attachment point where the nut and bolt failed from a stripping of the bolt threads. Petitioners contended, and offered evidence to prove, that the reason the nut and bolt failed was because the nut had been overtorqued, i.e. tightened excessively, and thereby partially stripped or weakened in assembly. Admittedly, overtorquing of the nut would so weaken the attachment that the wing would not withstand designed load limits.

Defendant claimed pilot error, contending that Dr. Hurley either became distracted, confused, or incapacitated and allowed the plane to get into a high speed dive, as a

result of which the left wing was torn off. Defendant denied any negligence or defect and introduced extensive evidence designed to demonstrate the extraordinary care and skill exercised in the assembly, inspection, and testing of its products. Much of this evidence would not be admissible in a products liability case tried upon a breach of implied warranty theory as alleged in Count I of petitioners' complaint.

The trial court held defendant was *not negligent* in the assembly, inspection, or testing of the wing, and *additionally* that there was *no defect* in the plane. The court made no specific finding concerning pilot error or the absence thereof, in effect concluding that for reasons unknown the plane went out of control, then came apart in the air, and crashed.

The Court of Appeals for the Seventh Circuit affirmed, holding inter alia, that although the trial court erred in dismissing the warranty count, that error was *harmless* because of the finding of the district court that there was *no defect* in the plane.

## REASONS FOR GRANTING THE WRIT AND SUMMARY REVERSAL.

### THE VIEW OF THE SEVENTH CIRCUIT TO THE EFFECT THAT THE TRIAL COURT'S ERROR WAS HARMLESS IS ERRONEOUS AND IMPOSES IMPORTANT LIMITATIONS UPON LITIGANTS' OPPORTUNITIES TO PRESENT THEIR CASES.

On appeal to the Seventh Circuit, the sole error claimed was the pre-trial dismissal of Count I of the petitioners' complaint alleging breach of implied warranty. The sole reason for the dismissal was lack of privity. The dismissal was error as the Seventh Circuit recognized (App. A. p. 3a):

> "On appeal, both parties are agreed the trial court misinterpreted the law of Indiana and that the decision of this court in *Dagley* v. *Armstrong Rubber Company*, 7 Cir., 344 F. 2d 245 (1965), holding privity of contract is not essential to an implied warranty cause of action in Indiana, is controlling."

The Seventh Circuit held, however, that the error was not prejudicial in view of the trial court's finding of no defect in the negligence action (App. A. pp. 9a, 10a):

> "Without such defect there could have been no negligence as charged in count II and no breach of implied warranty as charged in count I. The determination of the fact was critical • • • and was not beyond the issues. • • • the trial court in the instant case dismissed count I for lack of privity of contract. • • • such dismissal was erroneous. However, under the facts of this case, it was not prejudicial to plaintiffs because of the bar raised by the doctrine of estoppel by judgment, • • •"

Petitioners concede a finding of *no defect* was not "beyond the issues" in the negligent action, but suggests neither was it an "essential" finding to the judgment rendered. The trial court's finding of no negligence as contained in paragraphs 25 and 28 of the Findings of Fact were ample to support the judgment for the defendant on the negligence count. Thus there is serious question as to the *essentiality* of the defect finding within the meaning of the collateral estoppel doctrine as recognized by this court. *Yates* v. *U. S.*, 354 U.S. 298, 335-36 (1958):

> "That doctrine (Collateral estoppel) makes conclusive in subsequent proceedings *only* determinations of fact, and mixed fact and law, that were *essential* to the decision." (Emphasis supplied)

The applicability of the collateral estoppel theory is questionable on still another ground. Though the defect issue was common to both counts, the *rules and quantum of evidence* applicable to discharge petitioners' burden of proof differed materially as to the two counts of complaint. Hence the defect issue was not provable by the same evidence. Under such circumstances the Fifth Circuit has recognized in *Syms* v. *McRitchie* (5th Cir., 1951), 187 F. 2d 915, 918:

> "The usual test of identity of issues is whether the same evidence would suffice to sustain both. If different evidence would be required to sustain the two actions, a judgment in one is no bar to the other. *U. S.* v. *The Haytian Republic*, 154 U.S. 118, 14 S. Ct. 992, 38 L. Ed. 930."

Rule 61 of the F.R.C.P. provides that:

> "No error * * * in anything done or omitted by the court * * * is grounds for a new trial * * * unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every

> stage of the proceeding must disregard every error or defect in the proceeding which does not affect the substantial right of the parties."

In erroneously dismissing the warranty count, the trial court forced petitioner to proceed upon the negligence count alone thereby depriving petitioners of the opportunity to dismiss the negligence count and proceed solely upon the more favorable law of manufacturer's liability for breach of implied warranty. The implied warranty action proceeds upon a theory of strict liability as the Seventh Circuit recognized in *Dagley* v. *Armstrong Rubber Company,* (CCA 7th 1965) 344 F. 2d 245:

> "Regardless of whether warranty is considered to be a contract or tort action, we agree with the above quoted language in Skovgaard to the effect that the wrongful act does not require negligence or culpability."

The court then went on to embrace as the applicable law in Indiana, Section 402A of the American Law Institute's Restatement (2d) of the Law of Torts (pp. 347, 348), under which a manufacturer of a defective chattel is held strictly liable in damages for all injuries resulting from its use irrespective of fault or privity.

Since, in the strict liability action negligence is not an issue *the manufacturer cannot defend upon proof of freedom from negligence or fault in the manufacturing process.*

There are many recent decisions supporting this proposition:

*Dagley* v. *Armstrong Rubber Co.,* (CCA 7th 1965) 344 F. 2d 245;
*Snead* v. *Waite,* 306 Ky. 587, 208 S.W. 2d 749;
*Challis* v. *Hartloff,* 136 Kan. 690, 196 P. 1111;

*Simmons* v. *Wichita Coca Cola Bottling Company*, 181 Kan. 758, 332 P. 2d 633;

*Cerns* v. *Pittsburg Coca Cola Bottling Company*, 183 Kan. 758, 332 P. 2d 258;

*Piercefield* v. *Remington Arms Company*, 375 Mich. 85, 133 N.W. 2d 129;

*Picker X-Ray Corp.* v. *General Motors Corp.*, (D. C. Mun. App. 1962), 185 A. 2d 919;

*Coca Cola Bottling Company of Greenwood* v. *Simpson*, 158 Miss. 390, 130 S. 479, 72 A.L.R. 143;

*Brown* v. *Chapman*, (CCA 9th 1962) 304 F. 2d 149.

Typical of these cases is *Simmons*, where the Coca Cola Bottling Company offered evidence concerning the sufficiency of its machinery and plant and the methods used in bottling Coca Cola, on the issue of whether or not the beverage was contaminated, i.e., defective. In holding the evidence was *properly excluded*, the court said:

> "In view of what has been said, the trial court correctly excluded defendant's proffered evidence *as to the sufficiency of its machinery and plant and the method used in bottling the 'Coca Cola,' and the subsequent experimental tests made by its chemists as constituting no defense to plaintiffs' action based upon a breach of implied warranty.*" (Emphasis supplied)

In the case at bar, an abundance of evidence was offered by defendant (which petitioner had to anticipate and try to overcome) on such negligence issues as the adequacy of (1) defendant's assembly line procedures; (2) quality control; (3) inspection; (4) tools used; (5) testing procedures, etc. Petitioners could not object to this evidence in the negligence trial, despite the fact that the evidence would have been clearly inadmissible in a trial of Count I. Had petitioners been permitted to go to trial on Count

I, they could have voluntarily dismissed Count II, thereby eliminating the negligence issues and materially lightening their burden of proof. The trial court's ruling denied petitioners this opportunity.

Under the circumstances, it is abundantly clear that the District Court may have been influenced in deciding the *defect issue* by evidence which would have been *inadmissible* in a trial of that issue in the breach of warranty count. Consequently, the erroneous dismissal of the warranty count cannot be considered harmless under Rule 61, but is "inconsistent with substantial justice."

In *University City, Mo.* v. *Home Fire and Marine Insurance Co.,* (CCA 8th 1940) 114 F. 2d 288, 295, the court pointed out that Rule 61 was *not* intended "to deprive a litigant of a substantial right in the trial of a case, civil or criminal," and that; "whether or not a substantial right is invaded by the admission of irrelevant and incompetent evidence must depend upon the circumstances of each case."

Typical of the cases from other circuits holding similar error not harmless are: *Leimer* v. *Wood,* (CCA 8th 1952), 196 F. 2d 828, where an issue decided in an equity action without jury, was held not res judicata if the effect of such holding was to deprive a party of his right to have the issue tried by a jury; *Cervin* v. *W. T. Grant Co.,* (CCA 5th 1938) 100 F. 2d 153, where there was refusal to admit the deposition of the deceased in a wrongful death action; and *Commercial Banking Company* v. *Martel,* (CCA 2d 1941) 123 F. 2d 846 where the trial court erroneously denied a party the right to explain an admission made.

One of the most persuasive cases, however, is *Trout* v. *Pennsylvania Railroad Co.,* (CCA 3rd 1962) 300 F. 2d 826,

829, where an action was brought under both the Safety Appliance Act and the Federal Employer's Liability Act for damages for personal injury sustained while plaintiff was attempting to brake a railroad car in the course of his employment by defendant. The District Court directed verdict for defendant on the SAA claim and the jury returned a verdict for the defendant on the FELA claim, finding in answers to interrogatories that the brake was *not defective.* The Court concluded:

> "Defendant argues that in effect the SAA claim was thus submitted to the jury and the grant of a directed verdict, if erroneous, was thereby cured. The plaintiff, however, says that the interrogatory was meaningless, for the district court failed to charge the jury on the SAA claim, limiting the charge solely to the claim of negligence. A careful reading of the charge indicates that this was so. Of course, we agree that under that circumstance the interrogatory was of no avail.
>
> "The district court was under a duty to separate the two causes of action and to make it clear to the jury that neither evidence of negligence nor due care could be considered in determining defendant's liability under the SAA. *O'Donnel* v. *Elgin, J. & E. Ry. Co.,* 338 U.S. 384, 70 S. Ct. 200, 94 L. ed. 187 (1949)."

Finally, it is submitted that the decision of the Seventh Circuit in *McNaughton* v. *New York Central Railroad Company,* (7th Cir. 1955), 220 F. 2d 835, 840, is relevant. There the trial court on plaintiff's motion, *struck* an answer of the defendant (alleging prior election of remedies) *upon a preliminary showing* by affidavit that there had been *no election.* A judgment for the plaintiff was reversed upon the theory that defendant had a right to attempt to prove its defense anyway, the court saying:

"• • • However unlikely it may have seemed that defendant could sustain its defense, it, nevertheless, was entitled to an opportunity to prove it.

• • • • • •

"• • • Defendant was entitled to plead its statutory defense and to sustain, if it could, the burden of proving it as a bar to plaintiff's claim. To deny this was prejudicial error. F.R.C.P. 15 (a); *Peterson Steels* v. *Seidmon,* 7 Cir., 188 F. 2d 193."

The erroneous striking of Count II of petitioners' complaint was clearly just as prejudicial. Petitioners have been denied their day in court and an opportunity to attempt to prove their case under a *proper theory of "strict liability" and its different and more favorable rules of evidence.*

## CONCLUSION.

Thus the decision of the Seventh Circuit that the trial court's error was harmless was clearly incorrect. This case does not present simply an erroneous decision of a Court of Appeals, however. The abstract proposition upheld by the Seventh Circuit is that a trial court's finding may render harmless under Rule 61 an error of law, even if that finding may have been based upon evidence that would not have been admissible but for the error. This proposition is in conflict with the spirit of Rule 61 and many of the decisions construing it and constitutes an important impediment to a full and fair litigation of claims in the federal courts.

Petitioners would of course be delighted to present the issues of this case in full to the court. Petitioners believe,

however, that the prejudicial nature of the trial and appellate court's error are equally apparent. Accordingly, petitioners respectfully suggest that a full hearing in this court is not necessary and that it would be appropriate for this court to reverse the Court of Appeals' decision as to the harmlessness of the trial court's error and direct that a new trial be afforded petitioners upon the warranty count of their complaint.

Respectfully submitted,

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## APPENDIX A

In the

# United States Court of Appeals

## For the Seventh Circuit

SEPTEMBER TERM, 1965 — JANUARY SESSION, 1966

No. 15065

JOHN R. HURLEY and THE MERCHANTS NATIONAL BANK OF MUNCIE, Co-Executors of the Estate of Anson G. Hurley, Deceased, JOHN R. HURLEY, Special Administrator of the Estate of Shirley P. Hurley, Deceased, W. GALE PHENEGER and THE MERCHANTS NATIONAL BANK OF MUNCIE, Co-Administrators of the Estate of Inez Elizabeth Hurley, Deceased,

*Plaintiffs-Appellants,*

v.

BEECH AIRCRAFT CORPORATION,

*Defendant-Appellee.*

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

January 26, 1966

Before HASTINGS, *Chief Judge*, and KNOCH and KILEY, *Circuit Judges.*

HASTINGS, *Chief Judge.* This is an appeal by plaintiffs[1] from the judgment of the district court resulting from the

[1] Plaintiffs are the personal representatives of the respective estates of Anson G. Hurley, Inez Elizabeth Hurley and Shirley P. Hurley, deceased.

dismissal of count 1 of plaintiffs' complaint against Beech Aircraft Corporation.

Plaintiffs' complaint alleged in count I that on April 17, 1961, Dr. Anson G. Hurley, a qualified and licensed pilot, purchased from a dealer of Beech Aircraft a Beech "Bonanza" airplane, which airplane was expressly and impliedly warranted to be airworthy, free from defects, and safe for flight and use in the manner and for the purposes for which it was designed and intended.

On June 24, 1961, Hurley and his wife, Inez Elizabeth Hurley, and his sister-in-law, Shirley P. Hurley, took off on a routine flight in the plane from Muncie, Indiana to Teeterboro, New York. Dr. Hurley was flying the plane at about 11,000 feet when, suddenly, the complaint alleges, the left wing of the plane separated from the fuselage due to the failure of the upper main span attachment bolt and nut; and that, as a result, the airplane became uncontrollable and crashed, killing Hurley, his wife and his sister-in-law.

The complaint further alleges that the airplane warranty had been tortiously breached because the aircraft was defective, not airworthy, and unsafe for flight and use in the manner and for the purposes for which it was intended and designed. The defect in the plane was alleged to have existed because of the faulty design, construction, assembly, and attachment of the left wing to the aircraft.

Count II of the complaint makes substantially the same allegations, but proceeds under a negligence theory of action rather than implied warranty.

Because of the trial court's holding that privity of contract was essential to an implied warranty cause of action in Indiana, it dismissed count I of plaintiffs' complaint.

Trial was had without a jury on count II, the negligence action, and the court found in favor of defendant. Plaintiffs have not appealed from the adverse judgment on count II.

Plaintiffs assert as error the action of the district court in dismissing count I of plaintiffs' complaint, based on implied warranty and the failure of the district court to grant plaintiffs' motion to alter or amend judgment, or in the alternative, for a new trial.

*(Appendix A)*

On appeal, both parties are agreed the trial court misinterpreted the law of Indiana and that the decision of this court in *Dagley* v. *Armstrong Rubber Company*, 7 Cir., 344 F. 2d 245 (1965), holding privity of contract is not essential to an implied warranty cause of action in Indiana, is controlling.

In fairness to the learned district court, it should be noted that this dismissal of count I came about nine months prior to our ruling in *Dagley*, and the trial court's ruling in the instant case was consistent with its prior ruling in *Dagley*.

Defendant, however, argues the trial court committed no prejudicial error in dismissing the implied warranty count because the findings of fact necessarily made by the trial court in the trial of the negligence count collaterally estop plaintiffs from proceeding to a trial on the breach of warranty count. It is asserted the factual allegations upon which the plaintiffs must rely in the implied warranty suit, defect in the aircraft, have already been adjudicated adversely to plaintiffs in the negligence trial.

Plaintiffs, on the other hand, argue it was not necessary for the trial court to make findings with respect to defect in the negligence suit and, therefore, they are not estopped to proceed under the implied warranty count.

Both plaintiffs and defendant assert that *Dagley, supra*, supports their respective positions. Plaintiffs contend the action taken in *Dagley*, a remand to the district court for a trial on the issue of implied warranty raised in count I of the complaint, is appropriate.

Defendant, on the other hand, insists that *Dagley* is distinguishable from the instant case and cites the following language in support of its contention that had *Dagley* come before us on appeal in the posture of the instant case, it would not have been remanded.

> "Since the jury returned a general verdict on the negligence counts, we cannot determine the basis of its verdicts for defendants. It could have found, *e.g.*, that there were defects in the tire but that defendants were not negligent in designing or manufacturing the tire, or, that Collins was negligent in the operation

of the truck and such negligence contributed to the accident.

"We hold that the jury verdict and judgment on the negligence counts were not *res judicata* as to the warranty counts." *Dagley*, supra, at 250.

The essential allegations of defect in the aircraft in count I are:

"7. * * *. That said deceased was on said date flying said aircraft at about 11,000 feet over Licking County, Ohio when suddenly and without warning the left wing of said aircraft became detached therefrom, due to the failure of the upper main span attachment bolt and nut, and said aircraft became uncontrollable and as a consequence crashed to the ground as a result of which the said Anson G. Hurley and his wife, Inez Elizabeth Hurley, then and thereby suffered fatal injuries.

"8. That said aircraft was not as expressly and impliedly warranted by the defendant, but was in fact defective, not airworthy, and unsafe for flight and use in the manner and for the purpose for which it was intended and designed in that the left wing thereof as designed, constructed, and assembled, was not properly and securely fastened or attached to the fuselage * * *."

Count II of plaintiffs' complaint, the negligence action, recites the following as the essential allegations of negligence: incorporates by reference as rhetorical paragraph 6, rhetorical paragraph 7 from count I quoted *supra*; and repeats verbatim, with the exception of replacement of the breach of implied warranty allegation with a negligence allegation, as rhetorical paragraph 7 of count II, the language of rhetorical paragraph 8 of count I, quoted *supra*.

At a pre-trial conference, plaintiffs were required to amend count II to make rhetorical paragraph 7 more specific. The paragraph was amended to allege in substance that defendant was (a) negligent in the design of the aircraft in that the wing attachment bolts were loaded in tension; (b) negligent in manufacture through a partial

stripping or weakening of the nut and bolt assembly by over-torquing; (c) negligent in the assembly through over-torquing the nut and bolt assembly and failure to inspect and test the assembly; (d) negligent in selling a defective and unsafe product; (e) negligent in securing the wing to the fuselage through weakening the nut and bolt assembly by over-torquing and providing less than the designed strength. At the court's request, (d) was made more specific by alleging as particulars, (a) (b), (c), and (e).

Until the amendment of count II, there was an identity of factual allegations between counts I and II. The only substantive difference between the counts lay in their respective theories of action. Reading the original count I and amended count II together, it is clear that the defect in the aircraft alleged in count I is the same defect which was particularized in amended count II. Proof of the same defect was essential to recovery under either theory of the complaint.

On the question of the particular structural defect involved in both theories of action, the trial court made the following relevant findings at the conclusion of the trial on the negligence action:

> "26. * * *. Each of the four nut and bolt assemblies attaching the left wing to the carry through structure had a maximum torque applied in installation of not to exceed 2300 inch pounds. The threads on each of the bolts and in each of the nuts used in attaching such left wing were not stripped or sheared, and were not weakened. Such nut and bolt attachments were properly attached and would withstand the designed positive and negative load limits of the plane in question.
>
> "27. The torquing of the nuts and bolts referred to in item 26 did not partially strip, or shear, or otherwise weaken any one of the nut and bolt assemblies attaching the left wing to the carry through structure of the plane below the designed strength and security of each nut and bolt.
>
> "* * *.
>
> "29. The aircraft in question as actually assembled and sold by defendant was not dangerous, as alleged

in count two of plaintiffs' complaints, to the lives of the intended users thereof."

According to these findings, the particular defect in the aircraft on which the negligence action was tried did not exist. Further, according to general finding 29, the aircraft was not found to have been dangerous to the lives of the intended users, as alleged in count II.

The court entered further positive findings of fact as to what did happen in regard to the separation of the left wing from the plane.

"30. • • •. The plane was subjected to excessive up and down loads on its structures far in excess of the up and down loads for which the plane was designed. The excessive loads severely damaged and weakened the structures of the plane including the separation of the left wing from the plane in the air at some point substantially below 7,000 feet and substantially above ground level. • • •."

The court went on to state in finding 31 that the proximate cause of the plane's descent from 11,000 feet, its assigned altitude, to 7,000 feet, where it was observed by witnesses to be out of control, was not discernible from a preponderance of the evidence.

In sum, in their negligence case, plaintiffs were not able to show any defect in the aircraft nor any negligence on the manufacturer's part. Unless plaintiffs in their implied warranty action could allege some defect not alleged in the negligence action or not decided in the negligence action, they have had the issue of defect determined. That plaintiffs would rely on the same defects as were alleged in the negligence action appears evident from their briefs on appeal. They do not charge that a dismissal of the warranty action prevented them from raising some other defect in the plane not touched on in the negligence action. They make the somewhat vague and indefinite claim that permissible evidence and burdens of proof would be different and would favor them by forcing defendant to show the lack of any defect in the plane.

Plaintiffs' position is that in a trial on the breach of warranty, they would have only to show that there was an

in-flight structural failure of a brand new aircraft, that failure being identified as the separation of the wing while the plane was apparently in routine normal flight. This position fails to take into account the findings of fact of the trial court in the negligence action, quoted *supra,* which attribute the structural failure to excessive forces upon the plane and which state that the separation did not occur during the normal flight of the aircraft, but after it had descended to 7,000 feet from 11,000 feet in considerably less than a minute. Thus, the fact upon which plaintiffs are compelled to base their entire breach of warranty action, *i.e.,* a defect in the aircraft, is a fact with respect to which the trial court has already made an adverse findings.

In *United States Rubber Company* v. *Bauer,* 8 Cir., 319 F. 2d 463, 465-6 (1963), plaintiff farmer was injured when the drive belt on his combine broke and struck him on the head. He sued the manufacturer of the belt, basing his action on negligence and implied warranty. The case was tried to the court on both theories. Applying relevant state law on appeal, the court held that a defect in the product is never presumed merely from proof of the accident, but rather must be affirmatively proved. It also held that the absence of proof of the existence of a defect a defendant may not be held liable for negligence in manufacture or responsible on the theory of implied warranty. We find no inconsistency with the substantive law of Indiana in this holding.

In *General Motors Corporation* v. *Wolverine Insurance Company,* 6 Cir., 255 F. 2d 8, 9 (1958), a negligence action, it was held that where no negligence was shown in the manufacture, assembly or inspection of the left rear wheel of an automobile, and where no proof of any defect in the wheel was offered, the plaintiff had failed to show negligence as a matter of law. The court also held that standing alone the happening of an accident raises no presumption of negligence.

In *Lovas* v. *General Motors Corp.,* 6 Cir., 2 2 F. 2d 805, 807 (1954), recovery for wrongful death was sought due to a collision allegedly caused when the steering wheel

of a tractor manufactured by defendant came off its shaft. In affirming a directed verdict for defendant, the court said: "In order to have her case submitted to the jury appellant had the burden of introducing evidence of probative value which would tend to show that the steering wheel came off the steering shaft because of the negligent construction or assembly of the wheel and shaft, and that the accident was caused by such a defect."

In the instant case, it appears logical and sound to say that plaintiffs have the burden to prove by affirmative evidence that a defect in the aircraft caused the fatal accident in controversy as a prerequisite to recovery under either negligence or implied warranty. We so hold.

On the issue of collateral estoppel by judgment, defendant cites *Partmar Corp.* v. *Paramount Corp.*, 347 U. S. 89 (1954). There, the court said:

> "We have often held that under the doctrine of *res judicata* a judgment entered in an action conclusively settles that action as to all matters that were or might have been litigated or adjudged therein. But a prior judgment between parties has been held to operate as an estoppel in a suit on a cause of action different from that forming the basis for the original suit 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' This latter aspect of *res judicata* is the doctrine of collateral estoppel by judgment, established as a procedure for carrying out the public policy of avoiding repetitious litigation." *Id.* at 90-91.

Language even more in point appears in *United States* v. *Moser*, 266 U. S. 236, 242 (1924): "But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by erroneous application of the law."

*Yates* v. *United States*, 354 U. S. 298, 335-36 (1957) is also pertinent:

> "We agree * * * that the nonexistence of a fact may be established by a judgment no less than its existence; that, in other words, a party may be precluded

under the doctrine of collateral estoppel from attempting a second time to prove a fact that he sought unsuccessfully to prove in a prior action. * * *.

"* * *. That doctrine [collateral estoppel] makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision."

Later in the same opinion, the court makes the following statement: "The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding." *Id.* at 338.

We have held that even if a subsequent action is a different cause of action, a right, question, or fact determined in the prior action must, as between the same parties, be taken as conclusively established, so long as the judgment in the prior action remains unmodified. *Florasynth Laboratories* v. *Goldberg,* 7 Cir., 191 F. 2d 877, 880 (1951); *June* v. *George C. Petersen Co.,* 7 Cir., 155 F. 2d 963, 965 (1946); *Hummel* v. *Equitable Life Assur. Soc.,* 7 Cir., 151 F. 2d 994, 996 (1945).

Plaintiffs do not dispute the law of collateral estoppel by judgment; but they do try to escape its effect by arguing that the only findings essential in the negligence case would have been findings to the effect that the defendant assembled, inspected and tested the plane as a prudent manufacturer would have done under the circumstances and exercised ordinary care in the process. This argument ignores the fact that to find no defect in the aircraft is to find no basis for the charge of negligence in the manufacture of the aircraft and is thus merely a negative way of stating that the manufacturer was not negligent.

In light of the foregoing, we conclude that the question of fact, whether the aircraft was defective, was common to both counts of the complaint. Without such defect, there could have been no negligence as charged in count II and no breach of implied warranty as charged in count I. The determination of that fact was critical to the trial court's determination of count II and was not beyond the issues. Under the doctrine of collateral estoppel by judg-

ment, plaintiffs are now barred from proceeding under count I.

We had not decided *Dagley* v. *Armstrong Rubber Company,* 7 Cir., 344 F. 2d 245 (1965), at the time the trial court in the instant case dismissed count I for lack of privity of contract. Retrospectively, such dismissal was erroneous. However, under the facts of this case, it was not prejudicial to plaintiffs because of the bar raised by the doctrine of estoppel by judgment, as above set out.

The problem presented by this appeal will not likely recur as long as the rule in *Dagley,* with reference to lack of privity in contracts, is recognized as the law of Indiana.

For the foregoing reasons, the judgment appealed from is affirmed.

AFFIRMED.

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KILEY, *Circuit Judge,* specially concurring.

I concur in the holding of the court as limited to the facts here, with one observation:

As Chief Judge Hastings states, plaintiffs did not show here that they would not have relied, had Count I not been dismissed, upon the allegation of the defects found nonexistent in the trial on Count II. In my view, had the showing been made, justice would require remanding for the opportunity to amend Count I. But remand on this record merely to have defendant urge upon the district court a plea of collateral estoppel in defense of plaintiffs' vital allegation would be an unnecessary delay in passing on a question of law.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

## APPENDIX B

*Findings of Fact.*

30. That on or about June 24, 1961, the deceased, Anson G. Hurley, a licensed commercial pilot, was on a routine flight in the aircraft in question from Muncie, Indiana, to Teeterboro, New Jersey. Accompanying him in such plane was his wife, also a pilot, his sister-in-law, Shirley P. Hurley, deceased, and a minor son. That Anson G. Hurley, deceased, was on said date flying said aircraft at about 11,000 feet over Licking County, Ohio.

Such flight was authorized by the appropriate governmental authority and was on instruments for which Anson G. Hurley was duly rated and licensed. The oxygen content of the atmosphere at 11,000 feet altitude was less than that available to a human at sea level for the use of the body to maintain stimulus and response of the human senses. He had been flying at such altitude for some twenty to thirty minutes prior to the crash.

Anson G. Hurley at the time of this flight (unknown to Anson G. Hurley and the other passengers) was afflicted with the following disease and diseased conditions of his body: The two coronary arteries were severly diseased by two conditions called atherosclerosis (one condition being hardening of the arteries and the other condition was the narrowing of the lumen or vessel openings to the extent that the opening was one-fourth of normal.)

About 10:29 a.m. of June 24, 1961, Anson G. Hurley was advised by radio of a converging aircraft on a collision course. Anson G. Hurley acknowledged such communication on his radio and to a known associate his voice was normal. Within the approximate next sixty seconds, the plane of Anson G. Hurley was next observed by a number of witnesses situated on the ground at some altitude under 7,000 feet. Their attention was first attracted to it by excessive noise of the plane's motor as

it descended at a speed far in excess of the speed for which the plane was designed and out of control. The plane was subjected to excessive up and down loads on its structures far in excess of the up and down loads for which the plane was designed. The excessive loads severely damaged and weakened the structures of the plane including the separation of the left wing from the plane in the air at some point substantially below 7,000 feet and substantially above ground level. These witnesses then observed the plane ultimately descend and crash to the earth.

There was no in flight collision between the reported converging plane and the Hurley plane. The proximity of the two converging planes at their closest range is unknown; the effect of the proximity on the Hurley plane is unknown; and what evasive action, if any, taken by the Hurley plane is unknown.

31. What actually occurred between the short space of time of the radio communication at 11,000 feet altitude (concerning the converging aircraft) and the sighting of the plane out of control by the ground witnesses at 7,000 feet altitude is not discernible from a preponderance of the evidence in this case.

The parties have expended considerable time and expense in a well prepared and tried case to ascertain the cause or causes of the accident. The trial unlike discovery was procedurally maintained on the charged issues to avoid the extensive record that would result from a general inquiry into the cause or causes of the accident. The Court and the parties were thus limited and the breadth of evidence of an inquest or a court of inquiry was not reached.

What was the proximate cause of the plane being out of control when first sighted by the ground witnesses at or below 7,000 feet altitude, or what was the proximate cause of the plane's descent from 11,000 feet altitude to at or below 7,000 feet altitude where eye witnesses observed it was out of control and its crashing, is not discernible from a preponderance of the evidence in this case.